BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H. 19, as amended;

AND IN THE MATTER OF the complaints of Michael McKinnon alleging discrimination in employment on the basis of race, ancestry, ethnic origin and harassment by Her Majesty the Queen in Right of Ontario, Ministry of Correctional Services, Frank Geswaldo, George Simpson, P. James and Jim Hume.

BETWEEN:

Ontario Human Rights Commission

– and –

Michael McKinnon

Complainant

– and –

Her Majesty the Queen in Right of Ontario, Ministry of Correctional Services, and Frank Geswaldo, George Simpson, Phil James and Jim Hume.

Respondents

DECISION

Adjudicator : H. Albert Hubbard

Date : May 7, 1999

Board File No.: BI-0115- and BI-0033-95

Decision No : 99-003

Board of Inquiry (*Human Rights Code*)
505 University Avenue
Suite 201, Toronto ON M5G 2P3
Phone (416) 314-0004 Toll free 1-800-668-3946 Fax: (416) 314-8743
TTY: (416) 314-2379 TTY Toll free: 1-800-424-1168

APPEARANCES

Ontario Human Rights Commission	)	Jennifer Scott, Counsel
Michael McKinnon, Complainant	)	David Wright, Counsel
Her Majesty the Queen in Right of Ontario, Ministry of Correctional Services, Frank Geswaldo, George Simpson, Phil James and Jim Hume, Respondents	)	Marnie Corbold and Dennis Brown, Counsel

I. Introduction

A decision with respect to the allegations of harassment, discrimination, and acts of reprisal in relation thereto, made by Michael McKinnon in his complaints of November 29, 1988, and June 28, 1990, was handed down by this board of inquiry on April 28, 1998. Having found the respondents to be in breach of section 9 of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the *"Code"*) and liable for having infringed the complainant's rights under subsections 5(1) and 5(2) and section 8 of that *Act* in the manner and to the extent described therein, it was thereby ordered as follows:

1. That the respondents Frank Geswaldo and Her Majesty the Queen in the right of Ontario, Ministry of Correctional Services (the Ministry) pay the complainant, Michael McKinnon, jointly and severally, the sum of $5,500 as general damages for various acts of harassment and reprisal.

2. That the respondents Phil James and the Ministry pay the complainant, jointly and severally, the sum of $2,000 as general damages for various acts of harassment.

3. That the respondents Jim Hume and the Ministry pay the complainant, jointly and severally, the sum of $4,000 as general damages for acts of discrimination and reprisal.

4. That the respondents George Simpson and the Ministry pay the complainant, jointly and severally, the sum of $6,000 as general damages for an act of reprisal.

5. That the respondent Ministry pay the complainant the sum of $2,500 as general damages for discrimination through having permitted a "poisoned environment" as a condition of employment.

6. That the respondent Ministry compensate the complainant for the difference between his salary and the actual remuneration received by him while on "sick leave" owing to work-related stress from the time of his first complaint to the date of this award, together with appropriate pre-award interest thereon, such sums to be calculated by counsel or referred to me if they are unable to agree.

7. That within thirty days of the making of this order the respondent Ministry promote both the complainant, Michael McKinnon, and his wife, Vicki Shaw-McKinnon, to the rank of OM16, subject to his or her acceptance thereof, as the case may be.

8. That the respondent Ministry pay to the complainant and to Vicki Shaw-McKinnon the differences in remuneration between what they actually received and what they would have earned had they been promoted to the rank of OM14 following the competition held in March of 1989, and subsequently to the rank of OM16, together with appropriate pre-award interest thereon, such sums to be calculated by counsel or referred to me if they are unable to agree.

9. That the respondent Ministry relocate the respondent Frank Geswaldo, and that it ensure that neither he nor the respondent Phil James work in the same institutional facility as the complainant at any future time.

10. That the Ministry: (a) amend its records to correspond with part 6 of this order so as to ensure that the complainant's absences from the work place caused by work-related stress since the date of the first complaint are not reflected in those records and are not used in respect of any decisions that might affect him; and (b) provide access to the complainant's personnel file by the Ontario Human Rights Commission in order that it satisfy itself that that file is in conformity with the *Code*.

11. That within thirty days of the making of this award the respondent Ministry cause this series of orders (or such other text as counsel may agree upon) to be read at parade for five consecutive days, and that it attach a copy thereof to the pay slips of Metro East Toronto Detention Centre personnel and publish it in the institutional newsletter *Correctional Update*, or such other publication as may be appropriate.

12. That the respondent Ministry establish at its own expense a human rights training programme that meets with the approval of the Ontario Human Rights Commission, which may be called upon for assistance in that regard, such programme to be conducted within six months of the date of this award.

That series of orders was followed by the stipulation that this board of inquiry shall "remain seized of this matter until such time as this order has been fully complied with so as to consider and decide any dispute that might arise in respect of the implementation of *any aspect* of it, *including* questions concerning the amounts of monies that have been ordered to be paid." (Emphasis added.)

On March 23, 1999, when the hearing into this matter was reconvened in order to address outstanding issues of implementation, the complainant alleged that the fulfilment of the above orders by the respondent Ministry of Correctional Services (the "Ministry") had been neither timely nor complete and that, moreover, there had been further acts of harassment and reprisal, and that discrimination in the workplace persisted because of its continued "poisoned environment".

II. Monetary Issues of Implementation

Although a number of financial issues regarding the implementation of the April 1998 orders remained to be settled when the request to reconvene this hearing was made, nearly all of them had been resolved by March 23, 1999, leaving outstanding the question whether in principle the compensation referred to in orders 6 and 8 should take into account the fact that the complainant and his spouse, Vicki Shaw-McKinnon, must now pay taxes on the global amounts received at a rate in

excess of that at which they would have been taxed had these sums been paid in the lesser amounts involved in the years in which they were due. As noted in my decision of April 28, 1998 (32 C.H.R.R. D/1, at D/68):

> The governing principle being *restitutio in integrum*, my concern is to place the complainant in the position he would have been in had the wrongs not occurred and to compensate him for his actual pecuniary losses.

On the basis of that principle, I agree entirely with the submission made by counsel for the complainant that there should be a "gross-up for income tax purposes", in support of which he cited the March 24, 1995 decision of the Grievance Settlement Board in *OPSEU (Grinius) v. Ministry of Citizenship*. Whether the context be that of a grievance procedure or a human rights hearing, the principle is simply to place the injured party in the economic position he or she would have been in had the wrong not occurred, and that economic position must reflect the income tax implications of receiving a large lump sum in the current year as back-pay rather than having received lesser amounts in each of several preceding years.

III. Issues of Continued Discrimination, Harassment and Reprisals

As already indicated, the complainant alleges that, notwithstanding my decision of April 28, 1998, he has suffered further discrimination, harassment and reprisals, regarding which counsel on his behalf submits that I have discretionary jurisdiction to hear evidence and to make such rulings as are appropriate and that, having regard both to past difficulties and inordinate delays in dealing with his complaints, and to the complainant's perception of the vagaries of the Commission's internal processes, I ought to exercise that discretion.

As to the delays endured, counsel pointed out that, although filed with the Commission in November of 1988 and June of 1990, respectively, the hearing of the two complaints disposed of in my decision of April 28, 1998, did not begin until February of 1996. Regarding the complainant's anxiety about leaving in the hands of the Commission the question whether there should be a hearing into these latest allegations, it may be noted that, notwithstanding the Commission's decision to not refer to the board of inquiry a third complaint made by him on April 2, 1992, evidence regarding the allegations made therein was adduced at the hearing into the two earlier complaints with which I was seized, not only as being of a similar fact character, but because "in order to decide upon the

appropriateness of the other orders sought, evidence as to the existing situation (or 'atmosphere', or 'environment') in Mr. McKinnon's workplace must be adduced." (See my interim decision herein of April 9, 1996.) It transpired that the evidence of events and circumstances set out in that third complaint (much of it having been broached first by the respondents) established the truth of some of the allegations made therein for which, as my decision makes plain, those whose conduct was in question would have been found liable had I been seized of the complaint itself. Thus, the complainant is leery about leaving it to the Commission to decide whether I should be called upon to reconvene the hearing in order to deal with these allegations; nor does he take much comfort in counsel's firm assurance that, in dealing with the matter pursuant to subsection 41(2) the Commission would "fast track" this complaint, since it would admittedly retain thereunder the discretion to decide to not refer its subject-matter to the board of inquiry.

Counsel for the Commission, with whom counsel for the respondents agrees in that regard, is of the view that the complainant's latest allegations can only be dealt with by means of a fresh complaint filed with and investigated by the Commission, the circumstances in question being in her submission governed by section 41 of the *Code*, and more particularly by subsection (2) thereof, regarding the scope and effect of which there appears to be no jurisprudence. However, she did urge upon me the decision of the Ontario Court of Appeal in *Hryciuk v. Ontario (Lieutenant Governor)*, 31 O.R. (3d) 1, which she suggested dealt with a compellingly analogous situation. However, before turning to that case, since it is the very wording of the relevant sections of the *Code* upon which the Commission principally relies in its view that a board lacks jurisdiction in circumstances such as these, it is necessary to analyze the following provisions:

> 41.– (1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,
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> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

(2) Where the board of inquiry makes a finding under subsection (1) that a right is infringed on the ground of harassment under subsection 2(2) or subsection 5(2) or conduct under section 7, and the board finds that a person who is a party to the proceeding,

(a) knew or was in possession of knowledge from which the person ought to have known of the infringement; and

(b) had the authority by reasonably available means to penalize or prevent the conduct and failed to use it,

the board shall remain seized of the matter and upon complaint of a continuation or repetition of the infringement of the right the Commission may investigate the complaint and, subject to subsection 36(2), request the board to reconvene and if the board finds that a person who is a party to the proceeding,

(c) knew or was in possession of knowledge from which the person ought to have known of the repetition of infringement; and

(d) had the authority by reasonably available means to penalize or prevent the continuation or repetition of the conduct and failed to use it,

the board may make an order requiring the person to take whatever sanctions or steps are reasonably available to prevent any further continuation or repetition of the infringement of the right.

Whereas subsections 2(1) and 5(1) concern discrimination in relation to accommodation and employment, respectively, subsections 2(2) and 5(2) and section 7 referred to in the above provision are concerned exclusively with harassment in those contexts. Those provisions, together with subsection 36(2), are as follows:

2.– (2) Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupier of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, family status, handicap or the receipt of public assistance.

5.– (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or handicap.

7.– (1) Every person who occupies accommodation has a right to freedom from harassment because of sex by the landlord or agent of the landlord or by an occupier of the same building.

(2) Every person who is an employee has a right to freedom from harassment because of sex in the workplace by the employer or agent of the employer or by

another employee.

> 36.– (2) Where the Commission decides to not refer the subject-matter of a complaint to the board of inquiry, it shall advise the complainant and the person complained against in writing of the decision and the reasons therefor and inform the complainant of the procedure under section 37 for having the decision reconsidered.

It is to be noted that, prior to the establishment of "the board of inquiry" as a standing administrative tribunal to replace the serial appointment of *ad hoc* boards of inquiry under the *Code*, the forerunner of subsection 41(2) commenced with the words "Where *a* board of inquiry makes a finding ...", rather than with the words "Where *the* board of inquiry makes a finding ..." (emphasis added). In all other respects (save the changed numbering of the sections referred to) the present provision is identical with its predecessor, both of them providing that in the narrow circumstances described therein "the board *shall* remain seized of the matter and ... the Commission may ... subject to subsection 36(2) [formerly 35(2)] ... request the board to reconvene ..." Thus, it is not entirely clear whether the provision is meant to apply even in cases in which an *ad hoc* board (or panel of *the* board) has expressly stipulated as part of its order that it shall remain seized of the matter pending the fulfilment of certain conditions, or whether its purpose is to maintain the jurisdiction of an *ad hoc* board (or panel) that was silent in that regard so that, if it happens to have made a finding of harassment, then it will be that same *ad hoc* board (or panel) that will hear any subsequent complaint alleging the continuation or repetition thereof in respect of which the Commission, after investigating the matter, decides to request "the board" to reconvene. To enable the Commission to refer allegations of continued or repeated harassment to the same *ad hoc* board (or to the *same panel* of *the* board of inquiry) that originally decided the matter but which, for want of having expressly reserved its jurisdiction, would otherwise be *functus officio*, seems entirely reasonable. However, it is not self-evidently reasonable to enable the Commission to prevent by administrative fiat either an *ad hoc* board or a particular panel of *the* board of inquiry that has expressly remained seized of the matter from dealing with allegations of conduct interfering with the fulfilment of its orders. On the contrary, the very suggestion seems to me so patently inappropriate that I am convinced that subsection 41(2) is not to be so interpreted. And as to the express retention of post-decision jurisdiction by human rights tribunals, it was pointed out in *Grover v. National Research Council of Canada (No. 2)* 1994, 24 C.H.R.R. D/368 (at p. D/377-78), that:

> There are numerous *CHRA* decisions wherein the order providing remedies to a successful complainant include the retaining of jurisdiction to facilitate implementation. It is our understanding that these decisions on the question of retaining jurisdiction have not been challenged at any higher review court level ... [and such orders] often by their necessity require not only implementation but ongoing supervision. We are of the opinion that it necessarily follows by implication that a tribunal under these circumstances will be within its power to retain jurisdiction over the subject matter.

Be all of this as it may, given the express reference in subsection 41(2) of the *Code* to findings made under subsection 41(1) that, *on the ground of harassment under subsection 2(2), subsection 5(2) or section 7*, a right has been infringed in contravention of section 9, it seems to me clear that subsection 41(2) does not apply to findings that a right has been infringed in contravention of section 9 on the ground of *discrimination* under either subsection 2(1) or subsection 5(1), or on the ground of *reprisal* under section 8. Had the legislative intent been as counsel for the Commission suggests, surely the provision (which is referred to in the marginal note as "order to prevent harassment") would have referred as well to subsections 2(1) and 5(1) and to section 8; indeed, the text of subsection 41(2) preceding paragraph (a) could simply have read: "Where the board of inquiry makes a finding under subsection 41(1) that a right is infringed in contravention of section 9, and the board finds that a person who is a party to the proceeding ...", if that had been its aim.

Thus, in my opinion, even if the (or *a*) board has no jurisdiction to deal with allegations of the continuation or repetition of the infringement of a complainant's right in contravention of section 9 by way of post-decision *harassment* unless and until the Commission has investigated the complaint and referred its subject matter to that panel of the board (or to the *ad hoc* board) whose finding is in question, subsection 41(2) does not preclude that board, if it is not *functus officio,* from hearing allegations of *discrimination* and *reprisal.* And where a complainant alleges acts of discrimination and reprisal occurring during the period of implementation of a board's orders regarding which it has expressly remained seized, in my view that board cannot be regarded as *functus* and without jurisdiction to deal therewith no matter what the particulars of those allegations might be. However, before taking up more closely the meaning of "*functus officio*", I will deal with the submission of counsel for the Commission that the *Hryciuk* case (*supra*) applies to the situation before me and indicates that I lack the jurisdiction in question.

Hryciuk concerned allegations made regarding the conduct of a provincial court judge, following its investigation of which the Judicial Council recommended to the Attorney General that an inquiry be held with respect to the two specific complaints with which it had dealt. During the course of that inquiry the judge appointed to conduct it was informed of three additional complaints, none of which was first made to, or investigated by, the Judicial Council or referred to in the order-in-council appointing the inquiry judge. Upon the conclusion of the inquiry it was recommended that Judge Hryciuk be removed from office. In the course of her decision on behalf of the Court of Appeal allowing the application for judicial review, Abella J.A. observed (at p. 5) that:

> The inquiry judge's perception of her mandate was based on her interpretation of the relevant provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43; on the concluding paragraph of the order-in-council appointing her; and on her identification of the process as a public inquiry under the *Public Inquiries Act*, R.S.O. 1990, c. P.41, rather than as a discipline proceeding under the *Courts of Justice Act*. This analysis led her to the conclusion that she was obliged to hear *all* evidence which might be relevant to the issue whether Judge Hryciuk should be removed from office, regardless of whether the complaints had first been made to the Judicial Council.

Then, at page 12, Abella J.A. continued as follows:

> Pursuant to s.46 of the *Courts of Justice Act*, there can be no removal of a provincial court judge unless two prior conditions are met: that a complaint has been made to the Judicial Council *and* that the removal is recommended for any of the reasons set out in s.46(1)(b) after an inquiry has been held pursuant to s.50. The mandatory nature of these two conditions precedent is derived from the introductory language of s.46(1) which states that a provincial court judge can be removed *only* if these conditions have been satisfied.
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> There are, therefore, two stages in this statutory scheme which must have taken place before a provincial court judge can be removed by order of the Lieutenant Governor. The first is that a complaint must be made to the Judicial Council for investigation by that body into whether the complaint should be proceeded with publicly. The second stage, if so recommended by the Judicial Council, is a public hearing presided over by a judge of the General Division.
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> The two-stage process represents a clear statutory intention that not all complaints about judges should be subjected to public disclosure. Any such disclosure, even if the complaint is subsequently found to be without merit, can cause irreversible damage to reputation and, more importantly, to a judge's ability to maintain public confidence in his or her judicial capacities. ... The Judicial Council has, therefore, been charged with responsibility for screening allegations against provincial court judges, and to determine, after an investigation, whether the complaint raises a genuine issue about the judge's capacity to continue to perform his

or her judicial functions.

There is, of course, some similarity between the legislative scheme of the *Code* and that of the *Courts of Justice Act* in that, before a hearing into a complaint that a person's right under the *Code* has been infringed, that complaint must first be filed with the Commission, which must then investigate and endeavour to effect a settlement of it, and which may in its discretion decide to not deal with that complaint, or to not refer it to the board of inquiry for a hearing. Indeed, although evidence of the allegations in question was admitted for other purposes (which, incidentally, may be equally relevant to these latest allegations), the Commission having decided to not refer it to the board of inquiry, I was without jurisdiction to deal with issues of liability in relation to that third complaint of April 2, 1992, to which reference was made earlier.

In my opinion, however, the differences between this case and *Hryciuk* are far more pronounced than are their similarities. Whereas *Hryciuk* concerned a disciplinary proceeding under the *Courts of Justice Act*, a proceeding under the *Code* is remedial, the board being empowered not only to order restitution and award monetary compensation, but to direct a party who has infringed a right "to do anything that, in the opinion of the board, the party ought to do *to achieve compliance with this Act*, both in respect of the complaint and in respect of future practices." While it is equally true that "even if the complaint is subsequently found to be without merit ... irreversible damage to reputation" may be the lot not only of judges accused of wrongdoing, but of others as well (such as those accused of human rights violations), in *Hryciuk* it was explained that for the sake of public confidence in the justice system itself the two stage process under the *Courts of Justice Act* singles out for shielding from meretricious attack the reputations of judges, complaints against whom are not to be publicly aired without the approval of the Judicial Council. In contrast, unlike the quite specific purpose of these provisions of the *Courts of Justice Act* and the narrow interpretation given thereto in *Hryciuk*, human rights legislation is of a much larger scope, and according to *Robichaud v. The Queen* (1987), 40 D.L.R. (4th) 577, and a host of other decisions, it is to be given a broad, liberal and purposive interpretation. (A more detailed consideration of *Robichaud* will be found in the interim decision herein already referred to.) Finally, unlike the restrictive process under the *Courts of Justice Act*, once a board of inquiry has been appointed to hold a hearing to determine whether a right of the complainant under the *Code* has been infringed, it may go so far as to add as

a party to the proceeding any person appearing to it to have infringed the right in question; nor is it a condition precedent to adding as a party to the proceeding a person whose conduct appears to have infringed a right of the complainant that such conduct be made the subject of a new complaint filed with, investigated by, and then referred by the Commission to the board, rather than shelved, in accordance with its discretion under subsection 36(2).

While for these reasons I do not find the *Hryciuk* case apposite to the issue of my jurisdiction, I must nevertheless consider whether I am *functus officio* with respect to the allegations with which the complainant wants me to deal. The answer to that question depends in part, I think, on the specific nature of those allegations of which I am not yet apprised. If they are entirely unrelated to the complaints I have been appointed to hear and decide, and only coincidentally are in the nature of human rights complaints lodged by the same complainant against the same corporate respondent, then it seems to me necessary for him to seek the intervention of the Commission. But if his allegations arise from the still warm embers of his earlier complaints and relate to possible failures to implement orders made regarding matters of which I remain seized for purposes of clarification and such adjustment as might be necessary in order "to achieve compliance with this Act, both in respect of the complaint[s] and in respect of future practices", then I think my present jurisdiction extends to them. As was observed by the board in *Entrop v. Imperial Oil* (1994), 23 C.H.R.R. D/186, at page D/187:

> ... Where the parties to the case remain in a continuing relationship, events will continue to unfold. The questions concerning the process of [implementation] fall squarely within the original ground of employment discrimination alleged by the complainant. The information sought to be adduced is in the nature of a "continuum" of the matters raised in the first instance. [Note: for present purposes the word "implementation" has been substituted for the word "reinstatement" that appears in the actual text, reinstatement in that case being the principle aspect of implementation.]

The Commission's general mandate to investigate and attempt to settle complaints, and its discretion either to refer them or to not refer them to a board would seem irrelevant in the context of an ongoing legal proceeding regarding the same subject matter of which the allegations in question are but an extension. The parties, of course, may submit for the approval of the board some settlement of the matter agreed to by all; but it is not for the Commission, as a party to a proceeding in progress, to intervene in purportedly non-partisan guise, whether as investigator of what can be

brought out readily enough in evidence, as mediator of a dispute already being litigated, or as the repository of a statutory discretion. In fact, a serious conflict of interest would appear to arise if the Commission, which is a party to a proceeding that has not closed, and one whose interests are not identical to those of the separately represented complainant, were found in effect to retain an administrative veto the exercise of which might prevent the board charged with hearing and deciding a complaint from satisfying itself at the end of the day that compliance with the *Code* has been as fully achieved as possible.

The *Grover* case referred to earlier is a decision of a Canadian Human Rights Tribunal that deals at length with the concept of *functus officio*, and I find it much closer than *Hryciuk* to the circumstances before me. The tribunal in *Grover* rejected an argument that it had lost jurisdiction upon rendering its ruling, holding that, since it was dealing with the very matter it was appointed to decide, and of which it had remained seized for the purpose of overseeing the implementation of its order, it was entitled to provide clarification and assistance to enable that order to be carried out. In the *Grover* case, the tribunal had ordered (*inter alia*) that the complainant be appointed to "a position commensurate with his scientific capabilities", leaving it to the parties to define what that position was to be. The hearing then reconvened at the request of the parties to deal with questions of implementation, some of which were in consequence resolved. However, the matter as to what would be an appropriate position for the complainant remained unsettled, and the tribunal went on to identify three positions, to one of which it held the complainant must be appointed in order to satisfy the terms of its prior order. Thus, although it did not alter its *decision*, the tribunal in *Grover* obviously refined its *order* to the extent required to make it effective. Similarly, the reconvening of the matter before me on March 23 was not at my instigation, but at the request of the parties in order to consider and resolve outstanding issues of implementation. It is in that context that the complainant raises allegations couched in general terms that, *if true*, might perhaps suggest a failure to implement basic aspects of the April 1998 orders, thereby requiring supplementary directives to ensure that those orders are carried out and that this board's statutory mandate is fully discharged. However, I cannot know that until I have particulars of those allegations.

The *Grover* case (*supra*) is particularly relevant regarding the issue as to whether this board is *functus officio*. According to *Black's Law Dictionary* that Latin term means "a task performed" and

its legal meaning is "having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority". After quoting that definition, the tribunal in *Grover* went on to say (at pp. D/374) that:

> We believe that the wording of this definition is particularly important having regard to the decision of *Chandler v. Alta. Assoc. of Architects*, [1989] 2 S.C.R. 848.This decision was urged upon us by the respondent as the authority for the point this Tribunal is now *functus officio*. With great respect, we do not see how the *Chandler* case is of assistance in supporting the respondent's position. At p. 862 of that decision, the following language we believe supports the authority for retaining jurisdiction to resolve the implementation. Justice Sopinka at p. 862 recites the following excerpts:
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> > To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather that the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the view that its application must be more flexible and less formalistic in respect of the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal ...
> >
> > Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling status to dispose, it ought to be allowed to complete its statutory task ...

Under Ontario's *Human Rights Code*, the board of inquiry is required to hold a hearing in order "(a) to determine whether a right of the complainant under this Act has been infringed; (b) to determine who infringed the right; and (c) to decide upon an appropriate order". Accordingly, in my April 1998 decision I handed down a series of orders that seemed to me appropriate having regard not only to the situation as I found it to be at the time of that decision, but in light as well of what the situation was expected to be upon the full and timely compliance with those orders. In this regard, it is to be stressed that it was not only for the sake of resolving disputes that might arise between the parties regarding the monetary implications of those orders that I expressly retained jurisdiction over the matter "until such time as these orders have been fully complied with so as to consider and decide any dispute that might arise in respect of the implementation of *any aspect of them*". While the findings of harassment made under subsection 5(2) contributed to the poisoning of the workplace atmosphere, because I found the condition of that environment to constitute

discrimination under subsection 5(1), one of the principal purposes of the orders that I made was to enable the complainant and his spouse to return to a workplace free of that discriminatory atmosphere. Thus, it seems to me that allegations of continued discrimination and reprisals point to a dispute between the parties as to the implementation of *an aspect of* the orders to deal with which I remain seized.

As the decision itself makes plain, after careful consideration of the arguments of counsel in that regard, the various orders herein were crafted to serve both remedial and preventative purposes. Thus, it was only in the expectation of full and prompt compliance with these orders that I decided that it was unnecessary to accept the complainant's submissions regarding buffering orders to protect the complainant and his wife during the period of institutional renewal. One of these submissions (to which I will return presently) would have provided them with a period of two years in which to decide whether to accept the offers of promotion ordered to be extended to them. The other (as pointed out at p. D/69) was that:

> ... an order be made placing them on paid leave of absence for a period of six months, a period he said was meant to coincide with the completion of the human rights training programme that I have also been requested to order (see below). Counsel said that this would permit the McKinnons:
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> > ... to be away from the workplace until that training is completed and they can have some satisfaction that they will be returning to a workplace free from discrimination and harassment, a non-poisoned work environment so that the stress and distress they have suffered will not continue [to affect them].

However, it was my view at the time that neither the complainant nor his wife:

> ... require sheltering from the environment of the Centre until the completion of a proposed training programme. The evidence that has convinced me that the workplace environment continues to be "poisoned" is to a very considerable extent the similar fact evidence of its impact on others who would not be similarly sheltered from what I expect would be its diminishing adverse impact upon everyone who works in it during what I trust will be an effective and relatively short transition period.

As to the other unsuccessful submission made on behalf of the complainant, it was noted (at D/68) that his counsel had suggested that:

> ... while "Mr. McKinnon is hopeful and optimistic that with this board's findings and remedies the environment at the Metro East will change", in light of all

the evidence he has a legitimate concern about actually being moved into the position of OM16 and thus beyond the protection of the union and the collective agreement. Consequently, counsel proposes that:

> ... in all the circumstances what should be done is that Mr. McKinnon should be given the option as to whether or not he actually wishes to move into the position of lieutenant or simply to receive the pay for that position. And I submit to you that that option should remain open for Mr. and Ms. McKinnon for a period of two years after the date of your award to give them the opportunity to assess whether in fact the environment has changed and [there has been] a good faith effort on the part of management and the Ministry to change, and whether they feel they can confidently and safely, from a job-security perspective, actually assume the duties of the position of OM16.

In rejecting that submission, I went on to indicate that:

> ... One of the bases upon which these orders rest is that, having earned these promotions, the McKinnons have been and remain capable of performing the duties in question. Indeed, there was evidence that Mr. McKinnon had acquitted himself extremely well in an acting assignment at that rank during the course of the very difficulties with which he has had to cope. I would be loathe to order that the McKinnons be paid prospectively for the discharge of responsibilities they are in fact unwilling to assume on account of an environment in which they would have to work anyway. To suggest that they require the continued protection of the union for a period of two years, or until personally satisfied with that environment, whichever comes first, strikes me as unreasonable, *particularly given the various other orders the Commission and the complainant are also seeking*. [Emphasis added.]

The order regarding these promotions (number 7, *supra*) requires them to be offered to the McKinnons within a period of thirty days from the date of the decision, but it does not specify a time within which they are to be accepted. While I would have thought that the stated reasons for rejecting the complainant's application that such offers remain open for a period of two years indicated that they were to be acted upon in a reasonably prompt manner, evidently this was not clear to the parties, since neither the complainant nor his wife has as yet accepted the promotion offered to them months ago and it was only on March 23 of this year that the respondent Ministry sought clarification of this matter, counsel on its behalf then requesting that the beginning of April be set as the deadline in this regard. However, if the allegations of continued or repeated discrimination and reprisal during the period of implementation of these orders were true, then the assumptions upon which I based my refusal to incorporate such protective measures into such orders would prove to have been unfounded and that aspect of the matter might have to be revisited. Consequently, as already indicated to the

parties at the hearing on March 23, the offers of promotion need not be taken up until such time as the orders herein are fully implemented.

Whereas, in my view, under the principle of *functus officio* I am without jurisdiction to hear fresh allegations of human rights violations unrelated to the implementation of my orders, it remains open to the complainant to file a new complaint (whether as well as, or instead of, seeking to reconvene this hearing to deal with allegations that *do* relate to the implementation of my orders), which new complaint the Commission has promised to "fast track" and which, since it includes allegations of harassment, would in my opinion come before me pursuant to subsection 41(2) of the *Code* if referred to the board of inquiry for a hearing.

While it may not be entirely clear on first reading, I believe analysis of the subsection establishes that the reference from the Commission is to the *ad hoc* board or panel of the board, as the case may be, whose decision and finding is in question. Previously, the provision was that "Where *a board* of inquiry makes a finding ... *the board* shall remain seized ... [and] the Commission ... may request *the board* to reconvene ... [and] *the board* may make an order ..." It seems clear from this that "the board" that remains seized, that may be requested to reconvene, and that may then make an order, is the very one that made the finding; and if replacing the words "a board" with the words "the board" at the start of this particular provision (a substitution that was made throughout the *Code* when the present structure of the board of inquiry was established) were taken to have changed that aspect of it, then subsection 41(2) would be quite pointless. One must consider to what purpose the provision draws a distinction between complaints of harassment that are linked to previous findings (of boards that would otherwise be *functus officio*, I might add) in that they are continuations or repetitions thereof, and complaints that have no such link. Whereas the Commission may decide in either case to not refer the matter of the complaint for a hearing, if it decides to do so, and if the reference under the present provision is taken to be to "the board of inquiry" as a standing tribunal rather than to the very panel of the board of inquiry (or to the *ad hoc* board) whose finding is in question, then the process would be exactly the same whether the complaint of harassment is or is not linked to the previous finding, and the distinction, though clearly drawn, would serve no purpose. Since that interpretation denudes the provision of meaning and renders it superfluous, and there being no apparent alternative, it would seem that the proper way to interpret it is the one I suggest,

namely, that if pursuant to subsection 21(2) the Commission decides to "request the board to reconvene", the board that is to reconvene is the *ad hoc* board, or panel of the board, whose decision, findings and orders are in question.

IV. Decision

For the foregoing reasons, I have concluded that I have and should exercise the jurisdiction to hear evidence regarding allegations of continued or repeated discrimination and/or reprisals related to the implementation of the orders made in, and read in the light of, my decision of April 28, 1998, and to make such rulings in that regard as are consistent with that decision and that appear to me appropriate for the purpose of assuring the implementation of those orders and the achievement of full compliance with the *Code*. Thus, provided that sufficient notice of the particulars of such allegations and the opportunity to respond to them is given to the respondent in accordance with the requirements of fairness and natural justice, this hearing will be reconvened for that purpose upon the motion of the complainant. However, in order to avoid any overreaching of jurisdiction, before evidence of such allegations is adduced, I will want the written or oral submissions of counsel as to its relevance to the implementation of the orders herein.

I remain seized of this matter, of course, and may be spoken to by the parties regarding the sufficiency of notice and particulars, and the setting of a hearing date, or dates, such communications to be addressed to me through the office of the *Board of Inquiry (Human Rights Code)*.

H.A. Hubbard,
Chairperson

Dated May 7, 1999.